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TOWARDS CONSTITUTIONAL DEVELOPMENT WITHIN THE CHURCH*

Introduction

THE REVISION OF THE Code of Canon Law, currently in process, will play an important part, for good or evil, in the renewal of the Church. Conscious of the need for serious study, the Canon Law Society of America sponsored an interdisciplinary seminar in October, 1966, on the Role of Law in the Church. The recommendations from this study session pointed toward many of the values and structures found in a constitutional form of government.

With this as the background, the Canon Law Society in conjunction with Fordham University, under a grant from Our Sunday Visitor, Inc., sponsored a symposium (Oct. 7-9, 1967) in New York to explore the possibilities of a constitutional form of government for the Church. Scripture scholars, theologians, philosophers, historians, sociologists and experts in canon and civil law presented papers and exchanged reactions to them. Although profoundly aware of the limitations imposed by the shortness of the time available for their deliberations, the participants have nonetheless attempted a tentative position paper entitled "Towards Constitutional Development Within the Church."

Participants in the symposium wish to emphasize that there was much division of opinion and even radical disagreement in their two-and-one-half days of deliberation. Since, however, the Church's canon law is already in the process of revision, the symposium participants have unanimously agreed to present these views to the Vatican Commission for the Revision of the Code of Canon Law and also to the community at large, in order to initiate reflection and to promote discussion and comment.

* This is a position paper of the Symposium on a Declaration of Christian Freedoms sponsored by the Canon Law Society of America and the Catholic University of America, Washington, D. C., October 5-6, 1968.

General Principles to Guide Development

By way of preface, it should be noted that one of the most fundamental juridical facts is the existence of various Rites within the Catholic Church. It is essential to the process of developing constitutionalism that these Rites continue their proper life, with their own hierarchy, liturgy and canonical tradition. We hope to learn from their insights and that they will be responsive to ours.

Constitutional renewal, moreover, must look forward to future union with other Christian Churches (Eastern and Western) on a similar basis, i.e., with the maintenance, so far as possible, of their distinctive canonical and liturgical traditions and of their own hierarchy.

We do not look, therefore, for a fully formulated constitution for the Church either now or in the near future. Indeed, we leave open the question whether such a constitution could or should ever be fully formulated or reduced to written form.

Insofar, however, as the self-consciousness of the Christian way of life continues to express itself in every age and this expression tends to become normative for the Church, we think some principles can and should be formulated to guide the constitutional development of the Church.

Theological Principles

The Second Vatican Council adopted a method of correlation in its Pastoral Constitution on the Church in the Modern World, where it constructed its self-understanding of the Church's mission in terms of a response to the situation as it

really is. The Council referred to these realities as "signs of the times."

In proposing a theological context within which constitutional principles may be devised for the Church, one can readily and usefully pursue this same theological method. What, indeed, are the relevant "signs of the times?" The first is man's growing consciousness of his dignity as a person, which requires that he act on his responsibility and therefore in freedom. The second is man's growing consciousness of community, of that being with others and for others which is revealed, for instance, in the phenomenon of "socialization" in the sense of *Mater et Magistra* and is fundamental in *Populorum Progressio*.

In point of fact, the Church's emerging reflective awareness of her nature and mission (ecclesiology) corresponds organically with these distinctive "signs of the times." The Church is beginning to understand herself more clearly as a genuinely human community whose essential mark of identity is that she explicitly and publicly acknowledges the Lordship of Jesus Christ, affirming that what is happening, has happened and will happen in history makes sense because of the life and ministry, death and resurrection of Jesus of Nazareth. (In traditional terms, this is the Church's *kerygmatic function*.) The Church is a community which understands her mission as one with Christ's and which identifies herself with his ongoing, incarnational mission in the world and in history.

Accordingly, the Church is a community which, in addition to its *kerygmatic* function, exists to create and to

respond to genuine human community. (This is the Church's task of *diakonia*, of service in and for the larger community of mankind.) And, finally, the Church must offer itself as a kind of model, or sign of a genuine human community, and as such the Christian community should inspire confidence in the ultimate direction and course of human history. (This is the Church's function of *koinonia*, of fellowship.)

Any constitutional principles for the Church must be subordinated to this three-fold missionary responsibility which the whole Christian community shares through the power of the indwelling Spirit. These principles must facilitate, expedite, and actively encourage and promote the mission of the Church. Any legal or procedural realities which obstruct this mission *in any way* are to be revised accordingly or simply revoked. Nothing in the Church is superior to her mission. Indeed, the mission itself is more important than the Church (which is to say, in traditional theological language, that the Church is always subordinate to the Kingdom of God).

Theology and Principles of Constitutionalism

Given this particular ecclesiological context, it would seem that certain recognized principles of constitutionalism might be employed in the Church, at least analogically.

Firstly, since authority is exercised within and for the entire community and ultimately derived from the Word of God, the power of all those individuals and groups possessing authority within the Church is limited, and ways to make

the limitations effective must be found. The institutions which, in our opinion, are most relevant as limitations of power are the following: (1) a division of power between central and regional governing bodies; (2) the separation of legislative, executive, and judicial power; and (3) guarantees of individual rights, including due process of law.

Secondly, because all authority in the Church, as exercised by such individuals or groups, is for the service of the Church in the fulfillment of her three-fold mission, then there must be some means whereby those in authority are to be held accountable and responsible to those whom they are supposed to serve. The institutions which are most relevant here are the following: (1) the electoral process; (2) freedom of information, whereby the exercise of official power is a matter of public record; and (3) freedom of discussion and debate regarding the policy and performance of office holders as well as the ultimate assumptions of the community itself.

Thirdly, any constitutional principles devised must be permanently open to experimentation and must contain within themselves the means and program of perennial self-correction, because of the recognition that law is merely a means to the achievement of social ends and, consequently, demands revision as social conditions change. This juridical principle is fulfilled in secular societies by various means, the most important of which are these: (1) regular meetings of legislative bodies; (2) re-interpretation of law by tribunals; and (3) permanent commissions charged with the responsibility of proposing legal reforms.

General Principles for Legislative Process

We are living a new experience. We know that there must be universal participation in the deliberative process by which laws are formed, but we cannot know or prescribe *a priori* the forms through which such participation should evolve in the institutions and experiences of the Church.

The motivating principle for the development of deliberative structures at every level in the Church is the co-responsibility of all its members to continue the mission of Christ in the world. In establishing these structures, the Church will bring to bear the wisdom, experience and insight of all its members for the more effective achievement of its mission.

Bishops participate in such legislative bodies of the Church in virtue of their episcopal office. All others will participate because of the presence of the Spirit in the whole Christian community and as a matter of canonical equity. Participation by all is necessary in order for all to fulfill their obligations as members of the Church and to join with the Pope, the bishops and the pastors in their service of mankind. Such participation conforms to modern theological formulations as well as to ancient canonical practice.

In the development of legislative bodies the aim should be the maximum feasible participation by all segments of the community in the deliberative and decision-making processes. At all levels at least these fundamental conditions should be fulfilled:

(1) The body should meet regularly according to its own rules.

(2) The body should choose its own officers and determine its own rules of procedure and agenda.

(3) The deliberations of the body should be open and should be publicized.

(4) The body should have its own secretariat, with full access to relevant information and with the assistance of experts.

It is evident that the exercise of what is understood as a canonical legislative power will be of greater or less concern in various deliberative assemblies. In the present state of canonical institutes, the diocesan bishop would thus exercise his legislative power in the diocesan council or assembly, and members of an episcopal conference would exercise their legislative power in a national council or assembly. The desirable direction of constitutional evolution in the Church is for these bodies to broaden the legislative process by their own activities and to provide opportunities for greater and greater participation by all segments of the community.

Parish Council

When we speak of "parishes" or other local communities of Christians, we are fully aware that while traditional, territorial parishes are likely to continue, other forms of community are being studied and are developing.

There should be a parish council or assembly, selected by the community and representing all segments of the community.

The council should be the policy-making body for the community. Its

decisions should be reached on the basis of a consensus of the pastor and the representatives of the community, with due regard for the rights and opinions of the associate pastors, the religious serving the community, and the people.

Diocesan Council

In every diocese a policy-making council or legislative assembly should be established in which the clergy, religious and laity can all fully participate. All groups within the diocese should be represented in the council, whether these groups are gathered together in parishes, other local communities, or still other organizations which will and should be developed to speak for the various groups.

The deliberation of the council should conform to the four fundamental norms set forth above. Decisions should be reached on the basis of a consensus of the bishop and the representatives of the community.

National Council

There should be a national council or legislative assembly representing all the orders of the Church (laity, religious, clergy and bishops) to articulate the needs and, in appropriate spheres, establish policy for the Church within the nation. This council would complement the work of the present episcopal conference.

The principle of subsidiarity may also require the existence in some nations of regional conferences to consider specifically regional problems.

Universal Synod

The present Synod of Bishops should function in virtue of the episcopal collegiality of its members and not merely as a consultative body to the Pope. Legislation for the whole Church should be enacted according to the collegial principle.

Provision should next be made for representation of all orders of the Church in this synod.

All the fundamental conditions outlined above for a deliberative body should be observed by the synod.

Ecumenical Council

Similarly, when an ecumenical council is convened, all the fundamental conditions for a deliberative organ outlined above should be observed.

General Principles for Judicial System

Law can positively facilitate the development of the People of God. Ecclesiastical courts should creatively interpret law and, in so doing, contribute to the life and mission of the Church. Law should not be viewed primarily as coercive or prohibitory, but rather as an instrument for fostering and protecting the creative freedom of the members of the Christian community.

The experience of many nations has demonstrated the wisdom of some functional separation of the executive, legislative and judicial power at the practical level of government. The Church could benefit greatly from adopting, in so far as possible, this type of government.

For the proper discharge of the judicial function in the Church, there seems

to be a need today for two classes of tribunals:

- (1) formal courts;
- (2) boards of "mediation and arbitration."

The decisions of formal courts are binding on the parties. The decisions of boards of mediation and arbitration are not binding on the parties; either party, if dissatisfied, may invoke a formal court. The authority of the decisions of boards of mediation and arbitration shall derive from the inherent fairness of these decisions, from the publicity given to them, and from the standing of the judges who have rendered them.

While the existence of these two types of courts appears to be necessary at present, we hope that in many instances the securing of rights will be assured by procedures other than judicial.

The integrity of the judicial system depends upon the independence of the judges. This independence should be fostered by all appropriate means.

Formal Courts

Regional courts should be developed under the aegis of the episcopal conferences.

Parties should be fully apprised during the proceedings of the evidence upon which the decisions of formal courts will be based, and the parties should be given full opportunity to argue all the issues in dispute.

The procedure of formal courts should aim at simplicity and speed. Local and regional courts should give due consideration to the local and regional customs, culture, and ideas of procedural justice.

Courts should give the reasons for their decisions and should afford opportunity for the expression of judicial dissents.

The only criterion for personnel in the courts should be professional competence. No one should be disqualified on grounds of sex or lack of clerical status.

In so far as possible, formal courts should be staffed by full-time and professionally trained personnel.

Judges should be appointed for a term of years. In the interest of their independence, they should not be removable by executive order.

The binding interpretation of the laws of the Church should be reserved to the courts; executive offices or commissions should not have the right to make such interpretations.

The procedure in marriage cases should be as simple, flexible and expeditious as possible because:

- (1) the subject matter of the case is theological, i.e., the existence of a sacrament;
- (2) the most intimate rights of the parties are concerned;
- (3) the proceeding is not truly adversary;
- (4) the relevant evidence can often be collected from the parties themselves;
- (5) delay can cause irreparable injustice to the parties and to their children.

Boards of Mediation and Arbitration

There are many disputes which arise in the Church wherein the parties do not want to go formally to court. To solve these disputes in a spirit of fairness and

charity, there should be a system of boards of arbitration and mediation. These boards should take on the following character:

(1) their procedure should be informal, prompt, and adapted to local ideas and customs;

(2) the aim and purpose of the boards is a common-sense, equitable solution to the disputes brought before them;

(3) clergy, religious and laymen should actively participate in the structure and operation of these boards. Every effort should be made to find judges acceptable to the parties to the dispute.

General Principles of Administration

It should be assumed as a guiding principle that individuals operating within the administration of the Church will enjoy the greatest amount of human dignity and will perform most effectively when:

(1) they are given the maximum amount of autonomy and responsibility consistent with the overall goals of the administrative office;

(2) there is free communication between them and their superiors, when they are able to exercise influence over these superiors, and when the superiors provide the necessary support for the individual to carry out his work;

(3) decisions affecting the operation of the office filled by an individual are reached collectively by the office holder in collaboration with his superiors and co-laborers, rather than imposed from above through administrative edict.

Recruitment for administrative positions in the Church should ordinarily be

based upon the qualifications of available candidates.

Persons working within the administrative structures of the Church should be allowed the freedom, responsibility and scope for initiative common to professionals of similar training in their own societies. Included in this concept of professional status is the possibility of orderly advancement on the basis of merit rather than seniority, the consideration of individual preferences and abilities in the assignment process, and opportunities for continued training to maintain an adequate level of professional competence.

All major divisions of Church administration (international, national, diocesan) should develop structured means of research, planning, and internal criticism to obtain an adequate understanding of progress as well as deficiencies in administration. Such possibilities as the following should be considered and adopted when feasible:

(1) An office devoted to research and planning for the long-range development of the Church at the central, national, diocesan or parish level;

(2) An office of financial management responsible for accounting and accountability to the Church at large;

(3) Permanent means of assessing public opinion in the Church, e.g., through such techniques as probability samples and interviews with members;

(4) A "public relations" department whose function would be to provide information to Church members and the public at large on policies, procedures and related matters in the Church.

Composition of the Central Administration

The Pope and Synod, in their service of the Universal Church, are assisted by a Curia, which serves in an advisory, executive and administrative capacity.

Since the Curia is a transnational organization with operations throughout the world, it would seem that proper staffing of the Curia would necessarily require the utilization of personnel from many nations.

Major officials of the Curia should be changed at stated intervals in order to make certain that they actually represent the current mind and the needs of the Church.

To provide for the selection of suitable personnel for the Curia, it would seem advisable to establish an Appointment Board constituted of persons from various countries. The appointment of both major and minor officers should be made only after consultation with national conferences.

Function of the Central Administration

Decision-making falls into at least two distinct categories: basic policy determinations, and administrative directives to implement the basic determinations.

The making of general policy decisions at the level of the Universal Church should be reserved to the Pope and Synod. The function of the Curia is to assist in the execution of these decisions. In the course of such execution, the Curia may issue administrative directives concerned with interdiocesan or supranational questions. The Curia should

have no administrative authority in purely local matters.

Administration at the National Level

Powers which transcend the diocesan office of a bishop should be within the competence of the national conference of bishops, subject only to the provision that the national conferences of bishops should not act unilaterally on matters having an international impact.

Solution of cases involving acts of personal commitment (such as marriage, religious vows and celibacy) should be decided on the local level according to norms and directives established by the Central Administration.

Methods should be devised to enable the local Church, acting through the national conference, to have an active and truly effective part in the selection of bishops.

It would seem advisable that dioceses should not be established or divided without recommendations to that effect by the national conference.

In addition to the national conference of bishops, other national organizations should be developed through which bishops, clergy, religious and laity can strive to make their contribution to the effective administration of the Church.

Diocesan Administration

Legislation for parishes must encourage various kinds of structural divisions to meet the needs of the community.

Religious and laity, as well as the clergy should be encouraged to partici-

pate in various planning and consultative bodies in the diocese. Let them also study to make their contribution through voluntary associations of their peers.

Structures, especially parochial, should be revised to insure genuine fraternal relationships among the clergy. One example would be greater reliance on team assignments.

The professional rights of all clergy should be specified in future statements of Church order. The law should further professional initiative and responsibility.

Towards a Bill of Rights

In some of the documents of Vatican II, and in some of the encyclicals of John the XXIII and of Paul the VI, there has been explicit recognition of some of the fundamental rights of all human beings and, in particular, of all Christians.

Much more attention should be paid in the future, during the development of Church Law, to the legal protection of these human and Christian rights.

These rights may be classified broadly as substantive and procedural.

In the area of procedural rights, particular attention should be paid to the presumption of innocence, and to the rights of confrontation, cross-examination, and assistance by competent and independent counsel.

In the area of substantive rights, particular attention should be paid to the right to the expression of honest opinion (especially in the academic forum), to the equality of women, lay or religious, in Church Law, and to the necessity for giving *de facto* as well as *de jure* pro-

tection to all persons regardless of race or national origin.

Suggestions Concerning Methods of Development

(1) The process whereby good constitutional norms are embodied in the law of the Church demands extensive participation of all segments of the Church according to their capacity and competence. Indeed, all the general norms for full participation of all members of the Church (Section III), should also be normative for the ongoing process through which all the suggested forms of constitutionalism should be developed.

(2) Also the norms expressed for the judicial system of the Church (Section IV), are necessary for the process by which constitutionalism develops. Genuine protection of the creative freedom of all is a means for liberating those forces which move forward the process of constitutional development.

(3) Furthermore, all the suggestions of Section V, especially the remarks on Research and Planning, are applicable not only to the constitutional goal toward which this symposium is directed, but also to the process by which this constitutional reality develops. Feedback, self-evaluation, open relationships, free flow of ideas, all these elements hasten the healthy constitutional development with which this symposium is concerned.

(4) Before any codification of new law or extension of old institutions of law there should be a review of its necessity in terms of the changing life of the Church. Further, any formulation of law must reflect an awareness and assimilation of the cumulative knowl-

edge and experience, not only of the Church, but of all mankind, especially as available in modern disciplines, i.e., psychology, sociology, history, etc. Organic assimilation of these resources will always reflect the distinctive character of the Christian community.

(5) In all these respects, the medium of mass communication offers multiple possibilities. For this reason the process of developing new formulations of law should not only be non-secretive, and in the public domain, but should in principle receive as wide publicity as possible during the period of formulation.



OBSCENITY

(Continued)

realize that legislatures base their anti-obscenity statutes, not on the private moral standards involved in "sin", but on the public moral standards involved in the awareness (opinion) of the average man that, sin or no sin for the in-

dividual, obscenity, as adequately defined, in the long run erodes public moral values on which the common good is based.

Far from being disappointed, then, I am encouraged that the "intractable" legal problem of obscenity is showing signs of becoming tractable—another tribute to the capacity of our constitutional law for evolutionary development.





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